Supreme Court, U.S.
FILED
MAY 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-35

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

THE SUAREZ CORPORATION, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a Respondent before the Administrative Court of the United States Postal Service must raise Procedural Due Process or First Amendment challenges to the administrative proceedings as a prerequisite to making such challenges on appeal to the United States District Court.

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NO.

THE SUAREZ CORPORATION, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Arthur S. Leb, of Amerman, Burt & Jones Co., L.P.A., on behalf of The Suarez Corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the Sixth Circuit Court of Appeals filed February 28, 1989, in cases numbered 88-3593 and 88-3594, (App. A, p. 1-a) is not reported. The Memorandum Opinions of the District Court (App. B and C, pp. 2-a, 3-a) are also not reported.

JURISDICTION

The order of the Court of Appeals (App. A, p. 1-a) was entered on February 28, 1988. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . .

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall be . . . deprived of . . . property, without due process of law; . . .

STATEMENT OF THE CASE

A judicial officer of the United States Postal Service ("the Postal Service") decided a case against the petitioner. The petitioner appealed to the United States District Court in a complaint containing two counts alleging constitutional violations. The District Court dismissed these counts without citation of law on the basis that they were not properly brought, not having been argued "below".

The Postal Service Decision (App. D) and Orders (App. D, pp. 56-a, 58-a and 61-a) were entered by a Judicial Officer of the Postal Service pursuant to 39 U.S.C. 3005. They effectively terminated the right of petitioner to utilize a

certain direct mail promotion in its business. The Postal Service Decision (App. D) affirmed the orders.

Samples of The Suarez Corporation's direct mail promotion are contained in attachments to the District Court's Memorandum Opinion of May 3, 1988 (See Lodging Reference between Appendix pp. 15-a and 16-a)

The Decision and orders were issued following a hearing before a Judicial Officer of the Postal Service in which all the niceties of due process were observed, but only the appearance of due process was rendered. The bias of the Administrative Law Courts of the United States Postal Service against petitioner and all other respondents before it is manifest from its docket.

In its appeal to the District Court, the petitioner attacked the Postal Service decision and orders on two constitutional grounds. First, alleging pervasive bias against all respondents,

of property without due process of law in violation of the Fifth Amendment. Second, The Suarez Corporation claimed that it had been denied its rights of free commercial speech under the First Amendment because the Postal Service's decision and orders had been made without clear evidence that the direct mail promotion contained false and misleading representations, a prerequisite for a cease and desist order pursuant to 39 U.S.C. 3005.

The District Court's Memorandum Opinion of December 2, 1987 (App. B, p. 2-a) held that the constitutional arguments raised by Petitioner could only be heard "if raised in the Administrative Proceedings".

The requirement of the District Court that constitutional challenges to the Postal Service's Administrative Law Courts be raised in the Administrative Proceedings is indefensible either under the Administrative Procedure Act or the

United States Constitution. Of course, the District Court did not -- and could not -- cite any authority for its position.

REASONS FOR GRANTING THE PETITION

What if there is an Administrative Court of the United States government where no respondent brought before the "court" by the government ever prevails on the merits? What if it can be proven that during the 1980's, not one respondent brought before the Administrative Law Court of the United States Postal Service on a charge of engaging in false or misleading representations in violation of 39 U.S.C. 3005 prevailed on the merits?

There are only two possibilities: Either the Postal Service inspection division and counsel are models of perfect efficiency and never bring a case before the judicial officer that they cannot prove,

or the officials acting as judges in that "court" are somehow prejudiced and biased against all respondents brought before them.

Is the Postal Service as a whole a model of efficiency? Is it unreasonable to expect bias of judicial officers who share the same office premises in L'Enfant Plaza as those who prosecute cases before them?

On appeal, The Suarez Corporation raised this argument in support of its position that the Postal Service's orders against it deprived it of property without due process of law in violation of the Fifth Amendment. The Suarez Corporation also raised its First Amendment right that its commercial speech not be restrained without clear evidence that it was false or misleading, and therefore not entitled to First Amendment protection.

The District Court neatly sidestepped all of the issues raised by these arguments by holding -- without citation of any authority -- that it did not have to hear such arguments unless raised in the Administrative Court. The Sixth Circuit Court of Appeals sidestepped consideration of these issues by merely affirming the District Court's decision without an opinion.

This Court should hear this case and allow these contentions to come to light. There are compelling reasons why The Suarez Corporation should be allowed to present its arguments before this Court.

It is hornbook constitutional law that "no matter how complete the panoply of procedural devices which protect a particular liberty or property interest, due process also requires that those procedures be neutrally applied." Ciechon v. City of Chicago, 686 F. 2d 511 at 517 (7th Cir. 1982).

It is impossible for a respondent before an Administrative Law Court to receive a full and fair hearing if the hearing officers are biased. Such bias clearly violates procedural due process under the Fifth Amendment. Marshall v. Jerrico, Inc., 446 U.S. 238 100 S.Ct. 1610 (1980); Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456 (1975); In Re: Murchison and White, 349 U.S. 133, 75 S.Ct. 623 (1955).

The Postal Service's power under 39 U.S.C. 3005(a) is granted by Congress to prevent the dissemination of "false representations" through the United States Mail. Under the provisions of Title 39, the Postal Service's administrative action is reviewed by the Judicial Officer and his appointees. 39 U.S.C. 204. In the exercise of the general powers of the Postal Service under Title 39, the Judicial Officer of the United States Postal Service has promulgated regulations providing for the procedures to be used when

complaints are filed by the Postal Service against respondents who are alleged to violate Title 39 3005. The issuance of cease and desist orders against respondents brought before the Administrative Court of the Postal Service usually results in the total curtailment of the use of the mails. In this case, it destroyed a successful direct mail promotion that had received widespread consumer acceptance.

The comprehensive constitutional implications of such an exercise of the Postal Service's power has been recognized repeatedly by this Court. Stanard v. Olesen, 74 S.Ct. 768 (1954) (Douglas, J.); U.S. Ex rel. Milwaukee Social Democratic Publishing Company v. Burleson, 41 S.Ct. 352 (1921) (dissent of Brandeis and Holmes, J.J.).

The Suarez Corporation was never given a chance to prove its constitutional attacks against the Postal Service Administrative Law Court. It was never given the opportunity to adduce facts to

support its argument that no one prevails on the merits before that Administrative Law Court. Clearly, if it had been able to do so, then its argument that the hearing officer was biased would have had significant weight and its constitutional attacks on the action taken against it could not have been dismissed lightly.

The dismissal of the constitutional claims under Civil Rule 12(B)(6) interposed a requirement that the constitutional arguments must have been raised below for consideration on appeal. No citation of authority was ever given for this position, and this position clearly violates specific provisions of the Administrative Procedure Act and laws granting the District Court original jurisdiction of appeals of Postal Service decisions.

The Administrative Procedure Act, Title 5, U.S.C. 701 et seq. authorizes District Courts to review Administrative Court decisions. 28 U.S.C.

1339 and 39 U.S.C. 409(a) clearly grant Federal District Courts original jurisdiction to review the Postal Service's Administrative Law Court decisions.

Section 706(2)(B) of the Administrative Procedure Act requires the Federal District Court to make an independent assessment of the separate constitutional violations alleged by The Suarez Corporation. Therefore, contrary to the District Court's Memorandum Decision of December 2, 1987 (App. C), The Suarez Corporation appeal of the Administrative decision pursuant to the Administrative Procedure Act did not subsume within it the right to make independent constitutional attacks on that decision. Porter v. Califano, 592 F. 2d 770 (5th Cir. 1979). (Porter I), held that:

> The intent of Congress in 5 U.S.C. 706(2)(b) was that courts should make an independent assessment of a citizen's claims of constitutional right when reviewing agency decision-making. Whereas Section 706(2) authorizes reviewing courts to overturn agency findings and actions involving non-

> constitutional claims only when the agency has abused its discretion, 706(2)(A), acted arbitrarily and capriciously, Section 706(2)(A), or made findings unsupported by substantial evidence, Section 706(2)(E). Section 706(2)(B) explicitly authorizes the court to set aside any agency action contrary to constitutional right. 592 F.2d at 780.

In the context of the significant constitutional implications of Postal Service Administrative action, the District Court's refusal to even allow the allegations of the petitioner to be litigated violated specific provisions of the Administrative Procedure Act and ignored the District Court's original jurisdiction to review Postal Service action.

What if The Suarez Corporation's allegations about Postal Service Administrative Court bias are true? Obviously such a situation is intolerable. It should not be allowed to continue. The petitioner's arguments cry out for a hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 38-3593
88-3594

(STAMP)
FILED
FEB. 28, 1989
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE SUAREZ CORPORATION,

Plaintiff-Appellant,

vs.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee

(STAMP)
NOT RECOMMENDED
FOR FULL TEXT
PUBLICATION

ORDER

BEFORE: GUY and NORRIS, Circuit Judges; and BELL, District Judge*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

IT IS ORDERED that the judgment of the district court be, and it hereby is, AFFIRMED upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

S/Leonard Green

ISSUED AS MANDATE: March 23, 1989
COSTS: None

*The Honorable Robert Holmes Bell, U.S. District Judge for the Western District of Michigan, sitting by designation.

(STAMP)
1987 Dec-2
PM 2:04
Clerk, U.S. District Ct.

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Suarez Corporation,	)	
	)	
Plaintiff,	)	CASE NO. C87-358A
	)	
vs.	)	
	)	
The United States Postal Service	)	MEMORANDUM OPINION
	)	
Defendant.	)	

The plaintiff has filed an action designed to appeal the decision of the United States Postal Service which served to prohibit the plaintiff from engaging in direct mail promotions related to the plaintiff's promise to search the applicability of a person's right to ''unclaimed funds'' in return for payment of a research fee.

Count I of the plaintiff's amended complaint seeks a review of the decision pursuant to the provisions of the Administrative Procedures Act.

The defendant has filed a motion to dismiss Counts II and III of the amended complaint. Count II of the amended complaint alleges that the proceedings

instituted by the United States Postal Service deprived the plaintiff of property without due process of law because ''[t]hose who adjudicate cases in the Administrative Law Courts established to enforce 39 U.S.C. § 3005 are biased in favor of the Postal Service and fail to give respondents before said Administrative Law Courts an impartial hearing.''

Count III of the amended complaint contends that the decision under attack by the plaintiff denied the plaintiff its rights of free commercial speech under the First Amendment of the United States Constitution.

The motion to dismiss is well taken. The claims asserted under Counts II and III may be before the Court if raised in the administrative proceedings. In that sense, the claims asserted in Counts II and III are subsumed in the appeal set forth in Count I which alleges that the challenged action is not based upon substantial evidence and is arbitrary, capricious and an abuse of discretion.

This case will proceed upon the allegations set forth in Count I. The Court will conduct a status call in this case on December 23, 1987 at 8:30 a.m.

IT IS SO ORDERED.

S/David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

(STAMP)
Filed
1988 May-3 AM 8:04
Clerk U.S. District Ct.

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Suarez Corporation,	)	
	)	
Plaintiff,	)	CASE NO. C87-358A
	)	
vs. —	)	
	)	
The United States Postal Service	)	MEMORANDUM OPINION
	)	
	)	
Defendant.	)	

The plaintiff filed its amended complaint on May 29, 1987 and set forth three causes of action. The Court has since, on the defendant's motion, dismissed the second and third causes of action. This action continues as an appeal from the ruling.

The first cause of action relates to the administrative complaint filed by the United States Postal Service against the Suarez Corporation (''Suarez'') the plaintiff (''respondent'') alleging that Suarez was ''engaged in a scheme or device to obtain money through the mail in violation of 39 U.S.C. § 3005.'' Suarez was engaged in a mass mailing of a solicitation package of documents that the Postal Service charged were calculated to entice

the recipient into sending Suarez a fee of $19.00 to assist the recipient in locating unclaimed monies due the recipient. Approximately 1.9 million of the solicitation packages were mailed and of that number one million were targeted to ''opportunity seekers'' who had previously responded to a solicitation for a $6 ''diamond'' and participation in a sweepstakes.

Paragraph four of the administrative complaint charged Suarez with misrepresentations as to the solicitation package as follows:

a) Respondents are associated with or constitute a branch or instrumentality of federal, state or local government.

b) Respondents have conducted research which established that the addressee is entitled to receive unclaimed funds currently being held by federal, state or local government or by private organizations or individuals.

c) Respondents will confirm or verify the addressee's eligibility to receive unclaimed funds in return for the addressee's completion and submission by mail to respondents of an ''Eligibility Form'' provided by Respondents and the addressee's payment by mail to Respondents of a ''research compensation fee'' or ''compensation fee.''

d) Respondents will provide an addressee who meets the requirements described in (c), supra, information disclosing the location and amount of unclaimed funds to which he or she is entitled and instructions revealing where and how such funds may be claimed.

Testimony was taken by the Administrative Law Judge (''ALJ'') for five days. The Postal Service presented the testimony of consumer witnesses Doris Crowell and Frances Carter, Postal Inspector Greely C. Smith, State Officials Colleen Burback, Sandra Sadecki, and Marsha Nichols, and expert witness Paul A. Scipione, Ph. D. Respondents presented the testimony of Rodney Napier from the Suarez Corporation, expert witnesses John Pahmer, Stuart Herman, and Charles Winick, Ph. D. and consumer Elaine Session.

Suarez, in its appeal, claims that the agency action, based on the ALJ's decision and orders, is not based upon substantial evidence and is arbitrary, capricious and an abuse of discretion.

In support of that generalized attack, Suarez notes the following four ''Points For Review'':

1) THE ADMINISTRATIVE RECORD FAILED TO REVEAL SUBSTANTIAL EVIDENCE THAT WOULD JUSTIFY A REFUSAL OF THE ACTING JUDICIAL OFFICER TO FULLY CONSIDER AND WEIGH THE EFFECTS UPON CONSUMERS OF A QUESTION AND ANSWER BROCHURE INCLUDED WITHIN PLAINTIFF'S PROMOTION. FURTHERMORE, SUCH REFUSAL WAS

ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION.

2) THE ACTING JUDICIAL OFFICER'S DECISION REFLECTS FREQUENT INSTANCES WHERE EITHER HE FAILED TO SUPPORT HIS RATIONALE WITH EVIDENCE CONTAINED IN THE ADMINISTRATIVE RECORD OR WHERE HE NEGLECTED TO ACCURATELY REFLECT THE ADMINISTRATIVE RECORD IN SUPPORTING HIS DECISION.

3) THE ACTING JUDICIAL OFFICER DISREGARDED UNCONTRADICTED TESTIMONY OF A WITNESS REGARDING THE SURVEY WHOSE CREDIBILITY IS AT ISSUE.

4) THE ACTING JUDICIAL OFFICER ERRONEOUSLY RELIED ON AMBIGUOUS, CONFLICTING AND PRECONCEIVED TESTIMONY AND COMPLAINTS IN SUPPORT OF HIS DECISION.

APPLICABLE LAW FOR APPELLATE REVIEW

Review in this case is limited by the provisions of 5 U.S.C. § 706 which provides in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law;

. . .

(E) unsupported by substantial evidence . . . .

In challenging the cease and desist order growing out of the hearing and the order of the ALJ, the appellant, Suarez, has alleged that said action ''is not based upon substantial evidence, is arbitrary, capricious and an abuse of discretion.''

It is well settled that the phrase ''substantial evidence'' means more than a mere scintilla of evidence.

American Testing Institute v. U.S. Postal Service, 579 F. Supp. 1345, 1348-49 (D.D.C. 1984) teaches:

> This Court has the power to review such a determination by the Postal Service under chapter seven of the Administrative Procedures Act, 5 U.S.C. §§ 704 et seq., 706. It is important to note, however, that the Court's review of administrative determinations is a limited one. See generally, Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). It is plain that ''the power . . . vested in the Postal Service [by 39 U.S.C. § 3005] may not be interfered with by the courts unless it has exceeded its authority or is palpably wrong.'' N. Van Dyne Advertising Agency, Inc. v. United States Postal Service, 371 F. Supp. 1373, 1375 (S.D.N.Y. 1974), citing

Public Clearinghouse v. Coyne, 194 U.S. 497, 509, 24 S.Ct. 789, 793, 48 L.Ed. 1092 (1904); followed in Unique Ideas, Inc. v. United States Postal Service, 416 F. Supp. 1142, 1144 (S.D.N.Y. 1976). Courts apply the substantial evidence test as the standard of review. Substantial evidence has been defined as ''such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.''

DISCUSSION OF EACH POINT

We turn now to a consideration of the Suarez brief on appeal. Initially, we note that following the hearing, the ALJ published a very thorough opinion in which he commented extensively on the credibility of the expert witnesses, and then set forth precise findings of fact and conclusions of law.

Specifically, the ALJ addressed each charge contained in paragraph four of the complaint and found that each had been established, providing in some detail the basis for his reasoning.[1]

The four points of review, as styled by Suarez, appear to be designed to support

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[1] Samples of the material which constituted the solicitation package and which were modified periodically during the mailing are contained in Appendix 1 to this Opinion.

the claim that the order is unsupported by substantial evidence. The Suarez brief, as a predicate for its argument, described its promotion with respect to unclaimed funds, stating:

> As early as January, 1985, Suarez Corporation employees discussed the marketing of a service involving unclaimed funds in connection with Plaintiff's computer videotex system (Administrative Record hereinafter referred to as ''A.R.''-463).
>
> It was the Plaintiff's intention to obtain the computer magnetic tape of the unclaimed fund files of all fifty (50) states and to access this information on the Plaintiff's computer system. A mailing was tested, offering consumers the opportunity to see if their name appeared on any of the states' files (CX-1, 2, 7, 9; A.R. 463, 464).
>
> Although those states contacted by Plaintiff before the mailing began did keep the names of people with unclaimed funds on magnetic tape, others contacted subsequently did not, and it was later discovered that some states did not even have an alphabetical list of names. The promotion was, therefore, discontinued (A.R.465-66).

The mailing was sent to about 5,000 people in total. All of the money that had been collected was returned along

with a letter explaining that the system was not functional and that a new system was being developed. Id.

Thereafter, a promotion was created which offered consumers information on sources of unclaimed funds and benefits without actually searching states' files for the consumers' names. Consumers were to be provided, as a free service, the name, address, telephone number of their state's office of unclaimed funds, and instructions on how to contact the office to find if they had funds. Other sources of benefits were researched and the informationwas collected in documentation, developed in conjunction with IHS TeleTrans so that the information could be continually updated. IHS TeleTrans was a computer service offered to the public and operated by the Plaintiff. The promotion offered the documentation to consumers. Documentation is computer terminology for a document filed and stored in a computer system (A.R. 463, 466-467, 504, 517-518).

The promotion initially consisted of four (4) pieces - a letter, an eligibility form, an outer envelope and a return envelope (CX-3, 4, 8, 11).

In October or November, 1985, the eagle was removed from the letter and eligibility form and ''verified document'' was substituted in its place. ''Verified document'' was used

on the outer envelope, and the letter and eligibility form were changed so to match the envelope. CX-5 and CX-6 are copies of the letter and form with ''verified document'' (A.R.523-24).

In response to the Plaintiff receiving many calls requesting information about the promotion, it prepared a question and answer brochure to answer the five (5) most frequent information requests (A.R.479-482). From the beginning of the promotion in August, 1985, about 1.9 million pieces were mailed, of which about 1.3 million included the question and answer brochure (A.R.482-483, CX-15, CX-15(a).

Against the background of the ALJ's comprehensive opinion, the applicable law and Suarez's description of its promotions, we turn to a consideration of the four points of review.

In the first point raised, Suarez appears to state that the ALJ did not consider the question and answer brochure eventually added to the solicitation package and therefore did not consider all the evidence. The experts differed on the issue of whether the average recipient of the solicitation package would consider the question and answer package, a copy of which appears in the appendix to this opinion. The ALJ adopted the position of the expert witness called by the Postal Service and concluded that a majority of

the recipients would not read the question and answer brochure[2] and that its inclusion would not cure the overall representation contained in the solicitation package. The Court finds that the ALJ did consider the question and answer brochure. The fact that his analysis of its effect differed from that of Suarez's expert does not equate with the decision being unsupported by the evidence. The first point for review is without merit.

As to the second point of review, Suarez agrees that the ALJ need not fully explain and provide record citations for each and every conclusion. Seacoast Anti-Pollution League v. Costle, 597 F.2d 306, 311 (1st Cir. 1979) but then complains that the ALJ failed to support his rationale with evidence contained in the Administrative Record. The Court has read the opinion carefully and the rationale is explained in great detail as the ALJ justified his conclusion that the four alleged representations were indeed established by the record. The second point of review is denied.

Point three of the Suarez attack on the action of the U.S. Postal Service contends that the ALJ ignored a survey conducted by Suarez which found with respect to the 102 persons questioned by the Suarez survey that only 18 out of the 102 believed that

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[2] See Appendix 1, pp. 16-19 for copies of the question and answer portion of solicitation package.

the solicitation specifically mentioned that money was due them and when questioned further, each of the eighteen agreed that after a more careful reading, agreed that no specific amount was mentioned. In essence, the ALJ rejected the findings of the survey in reaching his conclusion and we find no basis in law to suggest that the ALJ was bound by the survey. The third point of review is denied.

Point four is predicated on the ALJ's decision to the effect that the allegations of the Postal Service were supported by the testimony of two consumer witnesses and by representatives of the unclaimed property divisions of Wisconsin, Minnesota and Iowa. Suarez contends that the ALJ should not have relied on or in any manner referenced their testimony as it was unreliable and is not entitled to deference from a reviewing court, citing United Commercial Insurance Services v. U.S. Postal Services, 650 F. Supp. 592, 596 (D.D.C. 1986). This Court disagrees with the position of Suarez as to the testimony of the consumer witnesses and the testimony of the three state representatives. But even if one were to discount that testimony, the Court finds that there is substantial evidence to support the decision and order of the ALJ. The fourth point of review is denied.

CONCLUSION

The Court finds that the decision and order of the Agency is supported by substantial evidence and the Court further finds that any argument of the respondent-plaintiff-appellant that might be characterized as demonstrating that the decision was arbitrary, capricious and an abuse of discretion is without merit. The order of the agency from which the appeal has been taken by count one of the plaintiff's complaint is sustained. The appeal is denied at plaintiff's costs.

IT IS SO ORDERED.

S/David D. Dowd Jr.

David D. Dowd, Jr.
U. S. District Judge

LODGING REFERENCE

The exhibits attached to the Opinion of District Court Judge Dowd dated May 3, 1988 designated in the Opinion as CX-1 through CX-21(D) cannot be reproduced in the format required for this Petition for Writ of Certiorari. They are therefore submitted with the Clerk as a ''Lodging'' and are available for examination in the form reviewed and evaluated by the District Court. Examination of the ''Lodging'' reveals the specific appearance and content of the mailings determined by the Postal Service Acting Judicial Officer to violate 39 U.S.C. §3005.

DESCRIPTION EXHIBITS ATTACHED TO JUDGE DOWD'S OPINION

CX1	Original Solicitation Letter of Direct Mail Promotion
CX2	Eligibility Form - To Be Completed By the Customer
CX3	Variation of Original Solicitation Letter of Direct Mail Promotion
CX4	Variation of Eligibility Form - To Be Completed By the Customer
CX5	Variation of Original Solicitation Letter of Direct Mail Promotion
CX6	Variation of Eligibility Form - To Be Completed By the Customer

CX7	Return Envelope
CX8	Return Envelope
CX9	Customer Envelope
CX10	Customer Envelope
CX11	Customer Envelope
CX12	Customer Envelope
CX13	Variation of Original Solicitation Letter of Direct Mail Promotion
CX14	Variation of Eligibility Form - To Be Completed By the Customer
CX15	''Question and Answer'' Brochure Included with Solicitation
CX15a	Variation of ''Question and Answer'' Brochure
CX16a	Envelope for Solicitation Follow-up
CX16b	Form of Response - Solicitation Follow-up
CX16c	Enclosure-Solicitation Follow-up
CX16d	Inclusion in Solicitation Follow-up
CX16	Return Envelope for Solicitation Follow-up

CX17	Variation of Form of Response - Solicitation Follow-up
CX18	Unclaimed Funds Report Index and Overview Page (sic)
CX19	Variation of Eligibility Form - To Be Completed By the Customer
CX20(A)	Variation of Original Solicitation Letter of Direct Mail Promotion
CX20(B)	Variation of Original Eligibility Form - To Be Completed By the Customer
CX21(A)	Variation of Solicitation Envelope
CX21(B)	Variation of Solicitation Letter
CX21(C)	Variation of Original Solicitation Eligibility Form
CX21(D)	Variation of ''Question and Answer'' Brochure

(POST OFFICE SEAL)
JUDICIAL OFFICER
Washington, DC 20260-6100

In the Matter of the Complaint Against	)	September
	)	22, 1986
	)	
IHS DEPARTMENT OF UNCLAIMED FUNDS AND BENEFITS	)	
IHS DEPARTMENT OF UNCLAIMED FUNDS	)	
DEPARTMENT OF UNCLAIMED FUNDS AND BENEFITS	)	
DEPARTMENT OF UNCLAIMED FUNDS	)	
at	)	
287 State Street,	)	
North Canton, Ohio 44767-0001	)	P.S. Docket
		No. 22/155

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United States Postal Service
Washington, D.C. 20260-1112

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APPENDIX D

POSTAL SERVICE DECISION

This proceeding was initiated on November 19, 1985, when the Postal Service filed a Complaint alleging that Respondents are engaged in a scheme or device to obtain money through the mail by means of false representations in violation of 39 U.S.C. §3005. Specifically, the Complaint alleges in paragraph 4 that Respondents falsely represent, directly or indirectly, in substance and effect, whether by affirmative statements, implications or omissions, that:

(a) Respondents are associated with or constitute a branch or instrumentality of federal, state or local government.

(b) Respondents have conducted research which established that the addressee is entitled to receive unclaimed funds currently being held by federal, state or local government or by private organizations for individuals.

(c) Respondents will confirm or verify the addressee's eligibility to receive unclaimed funds in return for the addressee's completion and submission by mail to respondents of an ''Eligibility Form'' provided by Respondents and the addressee's payment by mail to Respondents of a ''research compensation fee'' or ''compensation fee.''

(d) Respondents will provide an addressee who meets the requirements described in (c), supra, information disclosing the location and amount of unclaimed funds to which he or she is entitled and instructions revealing where and how such funds may be claimed.

In a timely filed Answer, Respondents denied that they made the above false representations or that they have otherwise violated the statute.

After agreeing to the issuance of a preliminary injuction by the U.S. District Court detaining Respondents' incoming mail, Respondents requested an expedited hearing by the Judicial Officer under 39 C.F.R. §952.17. At the request of both parties, it was ordered that the undersigned Administrative Law Judge would serve as the Acting Judicial Officer to hear this case and issue the final agency decision.

A hearing was held by the undersigned on February 26-28 and March 3 and 5, 1986, in Washington D.C. All parties were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Complainant presented the testimony of consumer witnesses Doris Crowell and Frances Carter, Postal Inspector Greely C. Smith, State Officials Colleen Burback, Sandra Sadecki, and Marsha Nichols, and expert witness Paul A. Scipione, Ph. D. Respondents presented the

testimony of Rodney Napier from the Suarez Corporation, expert witnesses John Pahmer, Stuart Herman, and Charles Winick, Ph. D. and consumer Elaine Session. In addition, both parties presented documentary evidence and entered into a number of written and oral stipulations. Thereafter, the parties filed proposed findings of fact and conclusions of law, reply briefs, and other briefs, all of which have been duly considered. To the extent indicated below, proposed findings and conclusions have been adopted; otherwise, they have been rejected as irrelevant or contrary to the evidence.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits, stipulations, and other relevant evidence adduced at the hearing, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Respondents and the Promotion

Respondent Suarez Corporation, 4626 Cleveland Avenue NW, Canton, Ohio 44709-1837, is a corporation organized and doing business under and by virtue of the laws of the state of Ohio. Respondent Benjamin D. Suarez, an individual, is the president of the corporate Respondent (Ans. ¶3). International Home Shopping, sometimes referred to as IHS, is a division of the Suarez Corporation (Tr. 461). In 1985 Respondents began a direct-mail promotion seeking the remittance of $19 to either

''Department of Unclaimed Funds, Regional Office,'' or ''IHS, Department of Unclaimed Funds and Benefits, Main Office'' in Canton, Ohio. The solicitation package was modified at least five times. Respondents mailed about 1.9 million of these solicitations and at least one million of those recipients were ''opportunity seekers'' who had previously responded to a solicitation for a $6 ''diamond'' and participation in a sweepstakes (Tr. 536-537, 598).

Prior to September 29, 1985, each solication package consisted of an outer carrier envelope, a letter, an ''eligibility form'', and a return envelope. After that date, the solicitation package also included a 4 page question and answer brochure (Tr. 463).[1] Persons who remitted the $19 received a loose-leaf booklet entitled ''Unclaimed Funds, Merchandise and Benefits Documentation'' (CX-18). The booklet listed the addresses of the various states' unclaimed funds departments, and discussed other possible sources of unclaimed money such as safe deposit boxes, overpaid taxes, and unclaimed products. These persons also received a ''free'' computer report entitled ''Unclaimed Funds Office Contact

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[1]The following solicitation packages, or portions thereof, set forth to some extent in Stipulation 1, are considered herein: (1) CX-1, 2, 7, 9; this was mailed in July 1985 (Resp. PFOF 57; Tr. 485-487); (II) CX-19; (III) CX-20(A), 20(B), 8; (IV) CX-3, 4, 8, 11, 15 and/or 15a; (V) CX-13, 14, 8, 15 and/or 15a, 21(A); (VI) CX-5, 6, 8, 12, 15 and/or 15a. An earlier version was mailed April 19, 1985 (CX-9).

and Eligibility Form Verfication'' setting forth the address and telephone number of the unclaimed funds office for the particular State in which the customer lives. Persons who submitted the eligibility form but did not remit $19 also received a similar free computer report providing the same information, but encouraging the prospective customer to order the ''Documentation'' (CX-16b).

II. The Expert Witnesses

Complaint's expert Paul A. Scipione, Ph. D., was clearly the most highly qualified and most persuasive of all of the expert witnesses. His testimony was forthright and credible. In reaching this conclusion, I have taken into consideration the minor inconsistencies in his testimony pointed out by Respondents. It has been stipulated that he is an expert in designing and conducting surveys of consumer perception, that he is an expert in consumer behavior and consumer psychology, and in the techniques and standard practices of the direct marketing industry (Stip. 3, para. 1). Dr. Scipione is a vice president of Response Analysis, a market survey research company (Tr. 286). He specializes in studying the attitudes, motivations, and behavior of consumers and businessmen with regard to the marketing of products and services (Tr. 266). He is a consumer psychologist who has spent about 15 years testing advertisements and commercials (Tr. 359). From his vast experience in testing direct-mail pieces and print ads, he knows what portions of a solicitation will be

read and what portions will not be noticed (Tr. 414). His testimony directly corroborates my independent findings that the solicitations in issue make the representations set forth in paragraph 4 of the Complaint.

Respondents rely primarily on the testimony of Charles Winick, Ph. D., a graduate professor of sociology and a consulting psychologist in private practice (Tr. 729). It has been stipulated that Dr. Winick is an expert in consumer behavior and consumer psychology (Stip. 3, para. 2). Dr. Winick's testimony was based, in large part, on the assumption that ordinary readers of Respondents' solicitations would read the entire package, including all of the small print (e.g. Tr. 737-741). His experience with consumer perceptions of direct-mail solicitations is slight in comparison to that of Dr. Scipione. Accordingly, I have given little weight to his testimony.

Respondents also rely on the expert testimony of John D. Pahmer, an expert in the techniques and standard practices of the direct marketing industry (Stip. 3, para. 4). He did not address the consumer perception of the four representations in issue.[2] He demonstrated that Respondents' solicitations contained many of the techniques used in the direct marketing industry (Tr. 585).

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[2]On cross-examination he mentioned that it was ''reasonably clear'' what was being offered (Tr. 605), but later admitted that the format of the ''documentation'' was unclear (Tr. 607).

Finally, Respondents rely on the testimony of Stuart Herman, an expert in designing and conducting surveys of consumer perceptions (Stip. 3, para. 3). Although Mr. Herman conducted two surveys concerning consumer perception of Respondents' solicitations, Respondents objected to the admission of the first survey (Wave I) on the ground that it was prepared for use in settlement negotiations. Although I do not necessarily agree with Respondents on that point, I have not considered the Wave I survey (CX-36) in making the decision herein. The second survey (RX-12) actually supports complainant's position that the representations in issue are made by the solicitations. Mr. Herman appeared more like an advocate than an objective expert. Notwithstanding his own survey, it was his opinion that the alleged misrepresentations did not exist in the solicitations (Tr. 705). He was frequently evasive and presented testimony that was inconsistent with his prior deposition (Tr. 722).

III. The False Representations

Each of the solicitation packages in issue make the representations alleged in subparagraphs (a) through (d) of paragraph 4 of the Complaint, and the representations are both false and material. The reasons for these conclusions are set forth below under each of the quoted representations.

Representation (a)

"Respondents are associated with or constitute a branch or

instrumentality of federal,
state, or local government.''

Each of the solicitation packages conveys the impression to the ordinary reader that Respondents are associated with or constitute a branch or instrumentality of federal, state or local government. My opinion is corroboratd, to a large extent, by the testimony of Dr. Scipione when he analyzed the consumer perceptions to the package consisting of CX-3, 4, 8, 11 and CX-15 (Tr. 297-298, 412).

The following quotation from the Respondents' outer envelope contributes to this representation:

''Department of Unclaimed Funds,
Regional Office 287 State Street,
North Canton, Ohio 44767

WARNING!
$500 reward for information leading to the prosecution of any party unlawfully interferring with or tampering with the delivery of this official notification.''
. . . ''Letter of Certification'' (CX-9).

In a later version, the return address and warning was changed as follows:

''IHS
Department of Unclaimed Funds and
Benefits Main Office,
287 State Street,
North Canton, Ohio 44767

WARNING
$500 reward will be paid by the IHS
Department of Unclaimed Funds and

Benefits, an independent division of International Home shopping, a non-governmental agency, for information leading to the prosecution of any party unlawfully interfering with or tampering with the delivey of this notification.

The name ''IHS'' and also the name ''Department of Unclaimed Funds and Benefits'' give the impression of a government agency (Tr. 302, 319) also, the ''WARNING'' contains the words governmental agency on the left side, and many ordinary readers would not notice the ''non-'' appearing on the right hand side of the previous line. Reference to a ''notification'' in the ''warning'' also connotes a government communication (Tr. 320). Also, CX-11 contains a large red stamp with the words ''VERIFIED LETTER'', which looks similar to a certified or registered letter endorsement and further conveys the governmental impression (Tr. 320-321).

The most recent outer envelope (CX-12) is similar to CX-11 except that the large red stamp says ''VERIFIED DOCUMENT'' instead of 'VERIFIED LETTER''. This envelope also gives a governmental impression.

Each of the letters also contributes to the overall impression that Respondents are a governmental agency. First, the letterhead on the July version (CX-1; Tr. 485-487) reads:

''DEPARTMENT OF UNCLAIMED FUNDS
Regional Office
287 State Street,
North Canton, Ohio 44767''

The letterhead on the remaining versions reads as follows:

''IHS
DEPARTMENT OF UNCLAIMED FUNDS AND BENEFITS
Main Office, 287 State Street,
North Canton, Ohio 44767''
(CX-20(A); CX-3; CX-13; CX-5)

The use of initials ''IHS'' sounds governmental (Tr. 302). In addition, the ''Department of Unclaimed Funds'' and the ''Department of Unclaimed Funds and Benefits'' does not sound like a company name, but a governmental entity (Tr. 302).

All versions of the letter have a drab look that is unusual for advertisements and further conveys the governmental image (Tr. 303). Also, the words ''Computer File'' above the named addressee is not a personalization technique and appears more governmental (Tr. 304). In addition, Respondents refer to themselves as ''this office'' or ''our office'' in the letter instead of ''our company'' (Tr. 304).

With the exception of CX-5, each of the letters has the picture of an eagle in the upper left-hand corner. The eagle is clutching an American flag in CX-20(a), CX-3, and CX-13. The eagle also contributes to the overall govermental image (Tr. 303). CX-5 replaces the eagle

with a red ''verified document'' stamp with a ten-digit number, which also looks official.

Dr. Winick testified that the disclaimer set forth under the eagle and the verified document stamp would show the consumer that the document came from a private enterprise (Tr. 737-738). These read as follows:

> An Independent Division of
> International Home Shopping
> a private enterprise
> (CX-20a; CX-3).
>
> (or)
>
> An Independent non-governmental
> Division of
> International Home Shopping,
> a private enterprise (CX-13; CX-5).

However, these disclaimers are written in very small print and many ordinary readers would not notice them.

Also, each of the letters begins its second paragraph with the words ''You are hereby notified'' and the letters conclude with the words ''Authorization By: J. Scott Cunningham. These also contribute to making Representation (a).

Dr. Winich also thought that the tiny copyright notice in the lower right hand corner ''1985 International Home Shopping'' would show the readers that it was a private enterprise (Tr. 738).

However, many ordinary readers would not notice this.

Each of the Respondents' promotions also contains an ''Eligibility Form'', which looks very much like a government form (Tr. 310). Each of the these forms contains, in large block print, the words ''Department of Unclaimed Funds'' (CX-2) or ''IHS, Department of Unclaimed Funds and Benefits'' (CX-19; CX-20(b); CX-4; CX-14; CX-6). Each of these has the same picture of an eagle (or in the case of CX-6, a ''verified document'' stamp) as appeared on the accompanying letter. The disclaimers under the picture are also the same with the exception of CX-19 which reads, in small print:

''An Independent Agency of IHS''

The Eligibility Form begins with the following words: ''NOTICE: This is an official document and must be completed only by those authorized. This form must be completed in its entirety and returned within 48 hours of receipt.'' (CX-2). The remaining eligibility forms had the words ''To insure our immediate attention'' after the word ''receipt.'' This notice gives a governmental impression (Tr. 311).

In addition to the name, address and telephone number, the form requires the recipient to fill in his social security number (Tr. 311).

Part two of eligibility form CX-19 states that ''the IHS Department of

Unclaimed Funds and Benefits is a private agency of a governmental agency'', with the words ''governmental agency'' appearing as the first words of the third line of Part two. Contrary to Respondents' assertion, this is not a typographical error and is consistent with the disclaimer in the upper left corner of the same exhibit, ''An Independent Agency of IHS'' (CX-19). The same words ''governmental agency'' also appear as the first words on the third line of Part two in CX-20(b), CX-4, CX-14, and CX-6. In each of the latter exhibits, the last word of the second line is the dangling, partial word ''non-.'' All of the lines in Part two are in small print, the lines are close together, and the entire section is difficult to read. Therefore, it is clear that many ordinary readers would not notice the ''non-'' and would merely see the words ''governmental agency.'' Obviously, those who saw the ''non-'' would look for the remaining part of that word or phrase, however, many would not see it due to the small print, the large number of words in each line, and the closeness of the lines. This same dangling ''non-'' also appears in the disclaimers under the eagle and verified document on CX-14 and CX-6 respectively, and on the outer envelopes for those documents (CX-21(A); CX-11, 12). The fact that many consumers would not read the dangling ''non-'' is confirmed by the testimony of Dr. Scipione (Tr. 316, 418, 439).

The light gray 60 percent bleed IHS logo on the reverse of the eligibility forms with the phrase ''Bringing the world into

your home'' would not be noticed by many ordinary consumers. Moreover, although the logo picture of the home with a globe inside appears more private than governmental, this would not negate the overall impression given by the remaining materials.

The ability to pay by credit card tends to give the image of a private company; however, this item would not change the overall impression for many ordinary readers. Finally, the copyright ''1985 International Home Shopping,'' which appears in very small print in the lower right hand corner of the eligibility form would not be noticed by many readers.

Each promotion package also contains a return envelope. (CX-7, 8). These envelopes contain a notice to the postmaster as follows:

> Mail in accordance with DMM SEC. 321.1,
> ISSUE IS, 2-21-85.
> SEC. 131.1, ISSUE 17, 12-20-64.

''This mail classified in accordance with the above section.'' CX-7 is addressed to ''Department of Unclaimed Funds, Regional Office'' and contains in large print ''OFFICIAL BUSINESS, FIRST CLASS MAIL.'' CX-6 is addressed to IHS Department of Unclaimed Funds main office and has the following large notice:

FIRST CLASS MAIL

Official Business of the Dept. of Unclaimed Funds and benefits an independent division of International Home Shopping./ The words ''independent division of International Home Shopping'' are close together and would not be noticed by many consumers (Tr. 412, 325) and the overall message would be that Respondent is a governmental agency (Tr. 324-325).

No earlier than September 29, 1985, Respondents began sending out a question and answer brochure (CX-15, 15a) along with th letter, eligibility form, and return envelope (Tr. 483). It will be assumed that this brochure accompanied the solicitations with the following letters: CX-3 (most were mailed in August, but some may have been mailed in September with CX-15), CX-13, and CX-5. Both of these brochures contain the same disclaimer which appears on the letter and the eligibility form:

> An Independent non-Governmental Division of International Home Shopping, a private enterprise

Again, this disclaimer would not be noticed by many ordinary readers. CX-15a has the picture of an eagle clutching an American flag. The document is entitled Your Questions Answered Concerning the IHS Department of Unclaimed Funds and Benefits and the Unclaimed Funds, Merchandise and Benefits Documentation. The third part of the brochure contains the following question and answer:

> ''5. In what capacity does the IHS Department of Unclaimed Funds and Benefits function? The IHS Department of Unclaimed Funds and Benefits is an independent, non-governmental Division of International Home Shopping, a private enterprise and a division of a fifteen-year old corporation. This corporation is a member of the Canton, Ohio Better Business Bureau and participates in consumer arbitration.

Also, the back side of the brochure is entitled ''Consumer Information on IHS.'' The sixth line refers to IHS as a ''national marketing and home shopping service.'' Later, it states that ''IHS has been in business for over 15 years'' and other computerized communications services of IHS are mentioned.

However, many ordinary consumers will form the impression that IHS is a governmental entity before they look at CX-15 (or CX-15a), and accordingly will not be interested in reading about the identity of IHS (Tr. 399,402). Also, a majority of people do not read the back side of direct-mail pieces (Tr. 388). Since the predominant impression of a government agency would be formed long before the reader got to the brochure, the brochure would not detract from the overall impression of Representation (a) given by the remaining materials (Tr.

396).[3] Even the survey conducted for Respondents (RX-12) which will be discussed in detail below, demonstrated that at least 11.76% of the readers who were exposed to the brochure in addition to the other materials still thought that Respondents were a federal or local government agency.

Other evidence in the record also corroborates my finding that Respondents make Representation (a). Dr. Scipione gave credible testimony that Representation (a) is made by the materials contained in CX-3, 4, 8, 11, 12, and 15 (Tr. 297-298, 412).

As previously mentioned, a survey (RX-12) was conducted for Respondents which indicated that 11.76% of the readers would consider Respondents to be a governmental agency. Although this percentage by itself; would represent a significant number of ordinary readers, it is quite

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[3]Respondents' expert John Pahmer admitted many consumers do not read everything, so each piece of a solicitation package should stand on its own (Tr. 604). He said many consumers would read the eligibility form first (Tr. 604). He said many consumers would read the eligibility form first (Tr. 593). Dr. Winick does not have the requisite direct mail experience, and his opinion that consumers will read about IHS in the question and answer brochure before reading the letter and eligibility form in detail (Tr. 735, 757) is rejected. Dr. Scipione's testimony on this is credible.

possible that this number would have been larger if the survey had been conducted properly. In this regard, it is noted that the survey began by asking a series of 15 questions relating to the relationship between direct-mail consumers and private companies, with particular emphasis on problems, guarantees, and returns (RX-12). This was highly irregular and improper and created an abnormal situation for the reader of the IHS materials (Tr. 347).

In addition, the unclaimed property division of the Wisconsin State Treasurer's Office received about 750 written inquiries and 400 telephone calls concerning the IHS promotion (Tr. 135). Many of the people contacting that office thought that the materials had come from a governmental agency (Tr. 139-140). Also, the office of unclaimed property of the Minnesota Department of Commerce received about 700 oral inquities and 300 written inquires concerning the IHS promotion (Tr. 197-198). Again, many of these people thought that IHS was part of the government (Tr. 199). Finally, the Iowa State Treasurer received about 650 telephone calls and 1.0 letters (Tr. 229-232). A large number of these people thought that IHS was a government agency (Tr. 232-233). Those who called in or wrote to these states with the mistaken idea that IHS was a part of the government did not get that impression from any publicity in the record.

Finally, Representation (a) is also supported by the testimony of

Complainant's consumer witnesses (Tr. 18, 19, 24-26, 29; Tr. 61).

Since IHS is not a governmental agency, Representation (a) is false (Tr. 10). Also, the representation is material because it tends to induce the remittance of $19 to Respondents.

Representation (b)

> ''Respondents have conducted research which established that the addressee is entitled to receive unclaimed funds currently being held by federal, state or local government or by private organizations or individuals.''

Each of the Respondents' promotion packages creates this impression to the ordinary reader. Those portions of the promotion packages contributing to this overall impression are set forth below:

Each of the letters tends to indicate that a file has been set up for the individual recipient, which tends to indicate that IHS has performed research. All letters have the words ''Computer File:'' above the name and account number of the individual recipient. They also indicate ''Status: Open'' and a ''Date code.''

Other portions of CX-1 making Representation (b) are as follows:

> ''This office is presently conducting a preliminary audit of

those who may be eligible to receive unclaimed funds, money or merchandise.

You are hereby notified that your name appears on our files as a potential recipient of each unclaimed funds.

The following categories are those now under audit: . . . .

There may be reason to believe that you are entitled to any of the above money, funds or merchandise. You do not have to know actual sources of unclaimed funds. The Department of Unclaimed Funds will research the entire fifty state Unclaimed Funds Bureaus for you. To prevent loss of benefits we strongly urge you to return the enclosed Eligibility Form within 48 hours of receipt so that we many determine the extent of your eligibility.

The above letter was created in July of 1985 (Tr. 485-487). The second paragraph of the letter was changed in July to read as follows:

''You are hereby notified that your name appears on our files as a person eligible to receive our documentation to aid in determining whether you are eligible to receive such unclaimed funds or benefits.'' (CX-20A).

The words ''You are hereby notified . . . to receive our'' constitute the first line of that paragraph. The subsequent versions were revised as follows:

> ''You are hereby notified that your name appears on our computer list files as a person eligible to receive our documentation to aid in determining whether you are eligible to receive such unclaimed funds or benefits.'' (CX-3, 13, 5).

In these versions the words ''You are hereby notified that your name appears on our computer list files as a person eligible'' appears as the first line of that paragraph. The remaining words of that sentence are very ambiguous and most consumers would not fully understand the meaning (Tr. 405). Many ordinary readers would get the overall impression that individual research had been done to them and they would fail to see the qualifying language. (Id.)

With the exception of CX-1, the third paragraph reads:

> ''The following categories are the principal sources of unclaimed funds, money, merchandise or benefits that we have researched: . . . '' (CX-20(A), CX-3, 13, 5).

This, too, adds to the impression (Tr. 325).

The following language also supports Representation (b):

> ''. . . There may be reason to believe that you are potentially entitled to one or more of the above money, funds, merchandise or benefits. You do not have to know actual sources of unclaimed funds or benefits. The IHS Department of Unclaimed Funds and Benefits will provide you with the Unclaimed Funds, Merchandise and Benefits Documentation . . . so that you may immediately begin the process of determining the extent of your eligibility. We will also prepare for you (whether or not you ordered the documentation) at no charge a personal computer report on your Unclaimed Funds Office contact that will include verification of the enclosed eligibility form.''

This language implies that Respondents have done prior research (Tr. 326). The use of the word ''may'' and ''potentially'' in the first sentence above does not change this result (Tr. 406). Many readers would think that the research had been done and that only their social security number and date of birth need be checked to see whether they were the proper person to receive funds (Tr. 313). In this regard, the eligibility form in each version requests the date of birth and social security number.

Part two of the eligibility form CX-2 states as follows:

> I hereby certify that I have received an official notification informing me that I am a potential recipient of unclaimed monies or merchandise . . . enclose my research compensation fee of $19 for the researching of the state records and filing a written report to me.

Subsequent versions of Part two of the eligibility form were modified to read as follows:

> I hereby certify that I have received official notification informing me of your service to aid in determining my eligibility as a potential recipient of unclaimed money, merchandise or unused benefits.

Block 8 reads:

> I have enclosed my $19 compensation fee for the Unclaimed Funds, Merchandise and Benefits Documentation. (CX-20(B), CX-4, 14, 6).

This also contributes to the representation (Tr. 330).

All versions also have an ''INTER-OFFICE USE ONLY'' box with a handwritten ''Case Number'' which implies that prior steps have been taken for the recipient as an individual (Tr. 314). In addition this box contains the following language:

''TO BE COMPLETED UPON RETURN:
Amount of unclaimed money: $ _____
Amount of unclaimed merchandise: $ _____
Approved by: _____ (CX-2)

or

''TO BE COMPLETED AFTER PROCESSING:
Amount of unclaimed money: $ _____
Amount of unclaimed merchandise: $ _____
Benefits eligible for: _____
Indeterminate: _____
(CX-4, 6, 14, 19, 20(B))

This box contributes to Representation (b) by implying that the recipient is eligible for some amount and that Respondents will fill in those amounts (Tr. 318).

As previously discussed, the consumers who also received the question and answer brochure as part of their solicitation package would form their impressions primarily on the letter and the eligibility form (Tr. 399, 402). Also, a person who has already formed the impression that research has been done establishing his eligibility would not be looking for an ''answer'' about that matter in the brochure. In any event, the brochure is ambiguous and is not directly inconsistent with Representation (b) (Tr. 397, 399-400).

The fact that Respondents' materials make Representation (b) is also fully supported by the testimony of Dr. Scipione (Tr. 298-299).

In addition, the Respondents' own survey (RX-12) found that 31.37% of the persons who read these materials, including the brochure, said that they would receive money. This strongly indicates that they thought that research had been done for them.

In addition, each of the representatives from the Wisconsin, Minnesota, and Iowa state unclaimed funds offices also established that many ordinary persons contacting them about the IHS promotion thought that research had been done establishing their eligibility to unclaimed funds (Tr. 139, 199, 215, 217, 219, 232-233, 249, 256).

Finally, Representation (b) is also supported by the testimony of Complainant's consumer witnesses (Tr. 22, 63-64).

Representation (b) is admittedly false (Tr. 10). The representation is material in that it tends to induce the remittance of $19 as a research compensation fee.

Representations (c) and (d)

"(c) Respondents will confirm or verify the addressee's eligibility to receive unclaimed funds in return for the addressee's completion and submission by mail to Respondents of an "Eligibility Form" provided by Respondents and the addressee's payment by mail to Respondents of a "research compensation fee" or "compensation fee."

(d) Respondents will provide an addressee who meets the requirements described in (c), supra, information disclosing the location and amount of unclaimed funds to which he or she is entitled and instructions revealing where and how such funds may be claimed.

Each of the solicitation packages makes Representations (c) and (d) to the ordinary reader. Those portions contributing to this overall impression are set forth below:

Each of the letters in the promotion packages contributes to these representations. In CX-1, the following language indicates to the ordinary reader that the Respondents will provide the necessary documentation so that the reader will know how much he is entitled to and how to go about obtaining the money:

> . . . You do not have to know actual sources of unclaimed funds. The Department of Unclaimed Funds will research the entire fifty states Unclaimed Funds Bureaus for you. To prevent loss of benefits we strongly urge you to return the enclosed Eligibility Form within 48 hours of receipt so that we may determine the extent of your eligibility. (CX-1)

The remaining versions of the letter contribute to this representation as follows:

> The IHS Department of Unclaimed funds and Benefits will provide you with the Unclaimed Funds, Merchandise and Benefits Documentation . . . Return the enclosed Eligibility Form and your documentation compensation fee within 48 hours of receipt so that you may immediately begin the process of determining the extent of your eligibility. We will also prepare for you (whether or not you order the documentation) at no charge a personal computer report on your Unclaimed Funds Office contact and the report will include verification of the enclosed eligibility form.'' (CX-3, 20(A), 13, 5).

An ordinary reader would assume that he would receive ''documentation'' after remitting his ''documentation compensation fee.'' The word ''documentation'' means the use of documentary evidence or a furnishing with documents to substantiate a claim. (Random House College Dictionary, 1975). The average person would assume that his ''documentation'' would show him the ''extent of (his) eligibility'' (Tr. 327-328). He would expect that Respondents would reveal the dollar amount of his unclaimed funds (Tr. 328).

The Eligibility Form itself implies by its name that the person who remits the $19 and sends in the form will have his eligibility confirmed. CX-2 states in Part two as follows:

> I understand that the Department of Unclaimed Funds is offering me the opportunity to determine my eligibility and entitlement of such monies or merchandise by researching each of the fifty states' unclaimed funds bureaus. The Department of Unclaimed Funds will also gather additional documentation on my behalf not normally recorded in the state unclaimed funds offices such as sweepstakes, contests, lotteries and other benefits to which I mmay be entitled . . . . (The Department) will help to expedite the transfer of such money or merchandise to me. To compensate the Department of Unclaimed Funds, I enclose my research compensation fee of $19 for the researching of the state records and filing a written report to me.'' (CX-2).

Part two of the later versions was changed, in part, to read as follows:

> ''I hereby certify that I have received official notification informing me of your service to aid in determining my eligibility as a potential recipient of unclaimed money, merchandise of unused benefits. I understand that (Respondents are) . . . offering me the opportunity to help me determine my eligibility and entitlement to such money, merchandise or benefits by providing me with Unclaimed Funds,

Merchandise and Benefits Documentation.''

Thereafter, Part two refers to the ''documentation compensation fee of $19 for the providing of the IHS Department of Unclaimed Funds and Benefits Service and Documentation'' and again refers to the personal computer report ''which will also included a verification of this eligibility form.'' This quoted material again supports the making of Representations (c) and (d) (Tr. 331, 441).

Finally, the ''INTER-OFFICE USE ONLY'' box leads the ordinary reader to believe that Respondents will fill in the dollar amount of unclaimed money when it receives the completed eligibility form and $19. In this regard, the box will be completed ''upon return'' (CX-2) or ''after processing'' (CX-19, 20(b), 14, 4, 6). This strongly supports the making of Representations (c) and (d) (Tr. 311). Dr. Winick's opinion that a consumer reading this would not anticipate that a particular amount of money due him would be entered there (Tr. 751) is rejected.

As previously discussed, many ordinary recipients of this material would not read the question and answer brochure and would form their impressions based upon the other materials. Moreover, even if persons did read the brochure, many ordinary readers would not notice the phrases tending to contradict Representations (b) and (c). For example, it is doubtful that many would notice the following sentence

appearing at the end of the third paragraph of the answer to Question 1:

> ''However, with the information that we provide, you can begin the process of determining whether or not you are one of those lucky persons.'' (CX-15, 15a).

My conclusion that Respondents make Representations (c) and (d) is corroborated, in part, by the testimony of Dr. Scipione (Tr. 299-300).

In addition, the survey introduced by Respondents (RX-12) found that 40.19% of those who read Respondents' materials, including the question and answer brochure, were of the opiniion that Respondents would provide a personal search for them after the form and $19 was returned to Respondents (RX-12 at p. 27). In addition, 18.62% were of the opinion that they would receive information about where, how much, and how to claim the money (RX-12 at p. 33).

The representatives of the three State unclaimed funds offices further corroborated the fact that Representations (c) and (d) are made. It was established in one State that about 60% of the people thought IHS would confirm or verify their eligibility to receive unclaimed funds (Tr. 166). Many people wanted to know where their money was, how much money it was, and what the property consisted of (Tr. 139). In another State at least half of the people that contacted the

unclaimed funds office were under the impression that the office was definitely holding funds for them (Tr. 199, 215, 217, 219). In another state, ''the majority'' of the persons contacting the office had the same impression (Tr. 232-233, 249, 256).

Finally, Complainant's consumer witnesses thought that Representations (c) and (d) were made. In this regard, Mrs. Crowell thought that Respondents had the information available to complete the inter-office use only block on the eligibility form (Tr. 25) and she expected to receive particular information advising her where her unclaimed funds were located (Tr. 23, 27). Frances Carter was under the impression that Respondent was holding funds for her (Tr. 63-4).

In conclusion, it is found that each of the Respondents' solicitation packages makes Representations (c) and (d) to a person of ordinary mind. These representations are false (Tr. 10). They are clearly material in that they tend to induce the reader to remit $19 to the Respondents.

Conclusions of Law

Each of Respondents' solicitation packages must be considered as a whole and the meaning is to be determined in light of the probable impact of this material on a person of ordinary mind. Donaldson v. Read Magazine, 333 U.S. 178, 189 (1948); Peak Laboratories, Inc. v. U.S. Postal Serv., 556 F. 2d 1387, 1389 (5th Cir. 1977). The

statute is intended to protect the gullible, naive, and less critical reader, as well as the more sophisticated, wary reader. Fields v. Hannegan, 162 F. 2d 17 (D.C. Cir. 1947), cert. denied, 332 U.S. 773 (1947); M.K.S. Enterprises, Inc. v. United States Postal Service, 459 F. Supp. 1180, 1184 (E.D.N.Y. 1978); Gottlieb v. Schaffer, 141 F. Supp. 7 (S.D.N.Y. 1956); Leo Daboub, P.S. Docket No. 19/185 (P.S.D. July 10, 1986).

Express representations are not required. It is the net impression which the advertisement is likely to make upon individuals to whom it is directed which is important, and even if an advertisement is so worded as not to make an express representation, if it is artfully designed to mislead those responding to it, the false representation statute is applicable. G.J. Howard Co. v. Cassidy, 162 F. Supp. 568 (E.D.N.Y. 1956); See also, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Where an advertisement is ambigous or capable of more than one meaning, if one of those meanings is false, the advertisement will be held to be misleading. Rhodes Pharmacal Co. v. F.T.C., 208 F. 2d 382, 387 (7th Cir. 1953); Ralph J. Galliano, P.S. Docket No. 19/15 (P.S.D. May 2, 1985 at p. 9). In addition, inconspicuous disclaimers are not sufficient to dispel the effect of false representations. Leo Daboub, supra; Gottlieb v. Schaffer, supra.

The Administrative Law Judge and the Judicial Officer can determine whether the representations are made, their effect on the ordinary mind, and materiality without the assistance of lay or expert testimony. Standard Research Labs, P.S. Docket No. 7/78 (P.S.D. Oct. 27, 1980); The Robertson-Taylor Company, P.S. Docket Nos. 16/98-102, 16/120-121, (P.S.D. March 31, 1986 at p. 29); Vibra-Brush v. Schaffer, 152 F. Supp. 461 (S.D.N.Y. 1957), rev'd on other grounds, 256 F. 2d 681 (2nd Cir. 1958).

Applying the foregoing standards, I find that each of the Respondents' solicitation packages makes the representations alleged in ¶4(a)-(d) of the Complaint. The Language contained in these soliciations, when read in context, which directly or impliedly makes these representations is set forth in the Findings of Fact. In addition, the representations are admittedly false and are material. Complainant has established its case by a preponderence of the reliable and probative evidence of record. S.E.C. v. Savoy Industries, Inc., 587 F. 2d 1149, 1168 (D.C. Cir. 1978).

Respondents argue that the Postal Service should apply the following deception standard recently adopted by the Federal Trade Commission in Cliffdale Associates, Inc., 103 F.T.C. 110 (March 23, 1984):

> . . . the Commission will find an act or practic deceptive if, first, there is an representation, omission, or practice that, second, is likely to

mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.

These elements articulate the factors actually used in most earlier Commission cases. Id. The Commission further clarified its position on this standard as follows:

> . . . the requirement that an act or practice be considered from the perspective of a ''consumer acting reasonably in the circumstances'' is not new. Virtually all representations, even those that are true, can be misunderstood by some consumers. The Commission has long recognized that the law should not be applied in such a way as to find that honest representations are deceptive simply because they are misunderstood by a few. (f.m. omitted). Thus the Commission has noted that an advertisement would not be considered deceptive merely because it could be ''unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.''

The Postal Service is clearly not bound by cases of the Federal Trade Commission; however, it may look to FTC decisions and court cases construing the FTC Act for guidance. Moreover, the federal court cases construing the postal false

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representation statute are legion. Accordingly, it is not necessary to decide whether the FTC deception standard is in conformity with the standards established by the courts and the Postal Service for cases arising under 39 U.S.C. §3005.

However, assuming arguendo that the FTC deception stand could properly be applied in the instant case, Respondents would still be found to make the representations alleged in the Complaint. First, the solicitations are so ambiguous that a significant number of ordinary and ''reasonable'' readers would get the overall impression set forth in Representations (a)-(d). Also, since about a million solicitations were sent to ''opportunity seekers,'' it is possible that an even greater number of those recipients would interpret the materials in a manner consistent with the above representations. In this regard, the fact that a million of Respondents' recipients, had previously paid $6 for a ''diamond'' and a chance in the sweepstakes indicates a group who ''would like to get something for free'' (Tr. 598).

Respondents have failed to persuade that the recipients of their solicitations are more sophisticated and intelligent then the ordinary, average person. Although Respondents' expert, John Pahmer, was of the opinion that the number of direct mail purchasers with higher incomes had increased nationwide, and that the latter probably, although ''not necessarily,'' were better educated,

Respondents did not establish that their recipients were above average in intelligence.

Respondents also argue that the degree of miscomprehension of their solicitations shown by their survey (RX-12) falls within the ''noise level'', i.e. the level of miscomprehension present in any scrupulously honest communication. As previously stated, the solicitations in issue are highly ambiguous and are susceptible to more than one interpretation. The average reader of Respondent's solicitations would easily find the interpretaions alleged as Representations (a)-(d). Since clear, lucid advertisements are not involved here, Respondents' contention is rejected. Moreover, Respondents' survey (RX-12) shows that 11.76% of the readers thought that IHS was a government entity. This percentage alone represents a significant number. Cf. Firestone Tire & Rubber Co. v. FTC, 481 F. 2d 246, 249 (6th Cir. 1973) (10% or 15% of consumers mislead was considered sufficient for violation of FTC Act). The percentages for the other representations in issue were much higher. Also, in view of the fact that the volume of Respondents' mailings has been high (1.9 million by their estimate), a very large number of people have already been mislead by these representations.

In reaching the conclusions herein, no reliance has been placed on the Herman ''WaveI'' survey (CX-36). Accordingly, it has not been necessary to decide whether that document is admissible for the

purpose of proving consumer perception. In addition, the fact that 2,300 people filed complaints or inquiries regarding the Respondents' promotion with the Postal Service has not been a significant factor in reaching the decision.

Respondents also argue that the ''first'' solicitation package (CX-1, 2, 7, 9), which is clearly the most misleading, should not be considered in this proceeding because that promotion was allegedly discontinued. Respondents contend that they intended to perform actual research of unclaimed funds in the 50 states for those who remitted $19, that they sent out the solicitations before they realized that the state files were not available to them, and that they returned the remittances when they realized they would not be able to perform the services. They then state that they developed a new promotion to sell the loose-leaf booklet containing sources of unclaimed funds.

Respondents' contention must be rejected. In the first place, it is not clear that the CX-1, 2, 7, 9 solicitation was the first version. In this regard, it was created and mailed in July of 1985 (Resp. Proposed Findings of Fact No. 57; Tr. 485-487). Respondents' Director of Marketing, Rodney Napier, testified that the promotion was developed in January 1985 (Tr. 463; Resp. Memorandum of Law, p. 19) and the record contains a ''Department of Unclaimed Funds'' mailing envelope with an April 19, 1985 postmark (CX-9). The CX-1, 2, 7, 9 solicitation is so similar to the later versions that it is likely that it is

another example of the ''new'' promotion. However, it does not matter whether this is a ''new'' or ''old'' promotion for the purposes of this decision because this solicitation makes the same false representations that are contained in the later versions. Accordingly, it cannot be said that the false representations were, in fact, discontinued. Moreover, in any event, discontinuance of an advertisement is generally not sufficient to make the issues moot. Profit and Churches of the New Octave, P.S. Docket No. 6/5 (P.S.D. Oct. 14, 1977); see also, United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953).

Respondents also contend that there was no detriment to consumers because the solicitations offered a money-back guarantee. However, it is well established that a promise to refund if a customer is dissatisfied will not dispel the effect of false advertisements. Farley v. Heininger, 105 F. 2d 79 (D.C. Cir. 1939); Borg-Johnson Electronics, Inc. v. Christenberry, 169 F. Supp. 746 (S.D.N.Y. 1959).

Finally, Respondents contend that their promotion is protected by the First Amendment to the Constitution. However, constitutional guarantees against restrictions of freedom of speech do not protect false advertisements. Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948). Advertisers possess no constitutional right to disseminate false or misleading materials. United States Postal Service v. Beamish, 466 F. 2d 804,

807 (3rd Cir. 1972).

CONCLUSION

After consideration of the entire record, it is concluded that as to each of Respondents' solicitations Respondents are engaged in a scheme to obtain money through the mail by means of false representations. Accordingly, the False Representation Order and Cease and Desist Order authorized by 39 U.S.C. §3005 are issued herewith.

S/Randolph D. Mason
Randolph D. Mason
Acting Judicial Officer

(POSTAL OFFICE SEAL)
JUDICIAL OFFICER
Washington, DC
20260-6100

CEASE AND DESIST ORDER NO: CD-1052
September 22, 1986

RE: IHS DEPARTMENT OF UNCLAIMED FUNDS AND BENEFITS
IHS DEPARTMENT OF UNCLAIMED FUNDS
DEPARTMENT OF UNCLAIMED FUNDS AND BENEFITS
DEPARTMENT OF UNCLAIMED FUNDS
287 State Street, North Canton, Ohio 44767-0001

It is ordered that Respondents BENJAMIN D. SUAREZ, an individual, and SUAREZ CORPORATION, a corporation, 4626 Cleveland Avenue NW, Canton, Ohio 44709-1837, doing business as IHS DEPARTMENT OF UNCLAIMED FUNDS, DEPARTMENT OF UNCLAIMED FUNDS AND BENEFITS, and DEPARTMENT OF UNCLAIMED FUNDS and Respondents' agents, employees and representatives, directly or through any corporate or other device, in connection with any promotion for which money or property is sought through the United States mail, do cease and desist from falsely representing directly or indirectly, in substance and effect, whether by affirmative statements, implications or omissions that:

(a) Respondents are associated with or constitute a branch or instrumentality of federal, state or local goverment.

(b) Respondents have conducted research which established that the

addressee is entitled to receive unclaimed funds currently being held by federal, state or local government or by private organizations or individuals.

(c) Respondents will confirm or verify the addressee's eligibility to receive unclaimed funds in return for the addressee's completion and submission by mail to Respondents of an ''Eligibility Form'' provided by Respondents and the addressee's payment by mail to Respondents of a ''research compensation fee'' or ''compensation fee.''

(d) Respondents will provide an addressee who meets the requirements described in (c), supra, information disclosing the location and amount of unclaimed funds to which he or she is entitled and instructions revealing where and how such funds may be claimed.

Randolph D. Mason

Randolph D. Mason
Acting Judicial Officer

(POST OFFICE SEAL)
JUDICIAL OFFICER
Washington, D.C. 20260-6100

POSTMASTER: Canton, Ohio 44711-9998

DATE: September 22, 1986

SUBJECT:
Transmittal of False Representation Order 86-114
P.S. Docket No. 22/155

Enclosed herewith is a copy of Order No. 86-114, dated September 22, 1986 forbidding the delivery of mail and the payment of money orders to:

IHS Department of Unclaimed Funds and Benefits
IHS Department of Unclaimed Funds
Department of Unclaimed Funds and Benefits
Department of Unclaimed Funds
287 State Street, North Canton, Ohio 44767-0001

This Order does *NOT cover (1) mail under frank or (2) mail covered by a penalty envelope* (penalty mail is not covered unless such penalty envelope appears to contain cash, checks, or money orders apparently in payment for merchandise connected with the enterprise covered by the enclosed Order or (3) *mail which appears to be unconnected with the activity covered by the Order.* In addition to mail that can be identified by other means as being within the third category, *that category includes letters from lawyers, magazines, newspapers, public utilities, and Federal, State and Municipal agencies.* Mail in any of these three

categories should be delivered to the addressee.

All mail which does not clearly appear to be in one of the three above categories shall be held for the addressee for no less than 48 hours after its receipt. The addressee or his designated representative, but no other person, shall have the right to open and inspect such at a reasonable hour during the said 48 hour period, in the presence of the postmaster or a postal employee designated by him. If an inspection cannot be held within 48 hours because of intervening holidays or other unforeseen circumstances, another 24 hours, or more, if necessary, should be allowed for inspection.

After such joint inspection, the inspected mail which is not connected with the enterprise covered by the enclosed order shall be turned over to the addressee or his representative.

Any mail containing cash, checks, or money orders apparently in payment for merchandise connected with the enterprise covered by the enclosed Order and any other mail connected therewith, except for mail containing demands for refunds, shall be withheld, stamped as indicated in the Order and immediately returned to the postmaster at the point of mailing, for delivery to the sender. However, all mail containing demands for refunds shall be turned over to the addressee of his representative even though connected with the enterprise covered by the enclosed Order.

Please acknowledge receipt of this memorandum and of the enclosed Order. Any questions concerning the enforcement of the Order should be directed to the Consumer Protection Division of the Headquarters Law Department.

S/Randolph D. Mason

Acting Judicial Officer

(POST OFFICE SEAL)

JUDICIAL OFFICER
Washington, D.C. 20260-6100

ORDER NO. 86-114 DATE: September 22, 1986

TO THE POSTMASTER AT: Canton, Ohio 44711-9998

Satisfactory evidence has been presented to the Postal Service in the case identified below by docket number that:

IHS Department of Unclaimed Funds and Benefits
IHS Department of Unclaimed Funds
Department of Unclaimed Funds and Benefits
Department of Unclaimed Funds
287 State Street, North Canton, OH 44767-0001

and their agents and representatives (hereinafter the ''Respondent'') are engaged in conducting a scheme or device for obtaining money or property through the mails by means of false representations in violation of 39 U.S.C. 3005 (formerly 39 U.S.C. 4005) with respect to the providing of information relating to unclaimed funds and benefits.

Now, therefore, pursuant to authority vested in the United States Postal Service, and by it delegated to me, I hereby forbid your payment of any Postal Money Order drawn to the order of the Respondent unless you are satisfied that such order does not relate to

the above described activities. Further, you are directed to inform the remitter of any Postal Money Order, the payment of which is forbidden by this Order, that the amount thereof will be refunded upon presentation to you of the original order or a duplicate thereof issued by the Postal Service.

You are further directed to hold for not less than 48 hours (exclusive of days during which your office is not open to the public) all mail addressed to the Respondent, whether registered or not, except for any mail, which you determine, by reference to the face of its wrapper, is unrelated to the above described activities. During the 48 hour retention period Respondent shall be permitted to examine the retained mail in your presence or the presence of a postal employee designated by you and to receive any mail which (1) is not connected with the above described activities, or (2)) is mail requesting a refund or representing a return of merchandise connected with such activities.

Following such examinations by Respondent or the passage of 48 hours, you are directed to write plainly or stamp the words ''Returned To Sender Due To Addressee's Violation of Postal False Representation Law'' upon the outside of all mail which the Respondent was not permitted

to receive and to return such mail to the post offices from which it was mailed for return to the senders. If the outside of the mail fails to contain information necessary to permit return to the sender, the mail shall be disposed of under the postal regulations applicable to undeliverable mattter.

P.S. Docket No. 22/155 : G.C. 426-85-F

S/Randolph D. Mason
Acting Judicial Officer

PS Form 1374-B, May 1986

§ 3003. Mail bearing a fictitious name or address

CODE OF FEDERAL REGULATIONS

Add:
39 CFR Part 10.

§ 3004. Delivery of mail to persons not residents of the place of address

CODE OF FEDERAL REGULATIONS

Add:
39 CFR Part 10.

§ 3005. False representations; lotteries
(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, including the mailing of matter which is nonmailable under section 3001(d) of this title [39 USCS § 3001(d)], or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which–

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person,

or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender;
(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note; and
(3) requires the person or his representative to cease and desist from engaging in any such scheme, device, lottery, or gift enterprise.

For purpose of the preceding sentence, the mailing of matter which is nonmailable under such section 3001(d) [39 USCS § 3001(d)] by any person shall constitute prima facie evidence that such person is engaged in conducting a scheme or device for obtaining money or property through the mail by false representations.
(b), (c) [Unchanged]
(d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery, (2) tickets or other materials concerning such a lottery within that State to addresses within that State. For the purposes of this subsection, ''State'' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or

possession of the United States, or (3) an advertisement promoting the sale of a book or other publication, or a solicitation to purchase, or a purchase order for any such publication, if (A) such advertisement, solicitation, or purchase order is not materially false or misleading in its description of the publication; (B) such advertisement, solicitation, or purchase order contains no material misrepresentation of fact: Provided, however, That no statement quoted or derived from the publication shall constitute a misrepresentation of fact as long as such statement complies with the requirements of subparagraphs (A) and (C); and (C) the advertisement, solicitation, or purchase order accurately discloses the source of any statements, quoted or derived from the publication. Paragraph (3) shall not be applicable to any publication, advertisement, solicitation, or purchase order which is used to sell some other product in which the publisher or author has a financial interest as part of a commercial scheme.

(c)(1) In conducting an investigation to determine if a person is engaged in any of the activities covered by subsection (a) of this section, the Postmaster General (or any duly authorized agent of the Postmaster General) may tender, at any reasonable time and by any reasonable means, the price advertised or otherwise requested for any article or service that such person has offered to provide through the mails.

(2) A failure to provide the article or

service offered after the Postmaster General or his agent has tendered the price advertised or otherwise requested in the manner described in paragraph (1) of this subsection, and any reasons for such failure, may be considered in a proceeding held under section 3007 of this title [39 USCS § 3007] to determine if there is probable cause to believe that a violation of this section has occurred.

§ 204. Assistant Postmasters General; General Counsel; Judicial Officer

There shall be within the Postal Service a General Counsel, such number of Assistant Postmasters General as the Board shall consider appropriate, and a Judicial Officer. The General Counsel, the Assistant Postmasters General, and the Judicial Officer shall be appointed by, and serve at the pleasure of, the Postmaster General. The Judicial Oficer shall perform such quasi-judicial duties, not inconsistent with chapter 36 of this title [39 USCS §§ 3601 et seq.], as the Postmaster General may designate. The Judicial Oficer shall be the agency for the purposes of the requirements of chapter 5 of title 5[5 USCS §§ 501 et seq.], to the extent that functions are (Aug. 12, 1970, P. L. 91-375, § 2, 84 Stat. 721.)

APPENDIX F

§ 409. Suits by and against the Postal Service

(a) Except as provided in section 3628 of this title [39 USCS § 3628], the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28 [28 USCS §§ 1441 et seq].

(b) Unless otherwise provided in this title [39 USCS §§ 101 et seq.], the provisions of title 28 [28 USCS §§ 1 et seq.] relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties, and the rules of procedure adopted under title 28 [28 USCS §§ 1 et seq.] for suits in which the United States, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.

(c) The provisions of chapter 171 [28 USCS §§ 2671 et seq.] and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

(d) The Department of Justice shall furnish, under section 411 of this title [39 USCS § 411], the Postal Service such legal representation as it may require, but with the prior consent of the Attorney General the Postal Service may employ attorneys by contract or otherwise to conduct litigation brought by or against the Postal Service or its oficers or employees in matter affecting the Postal Service or its officers or employees in matter affecting the Postal Service. (Aug. 12, 1970, P. L. 91-375, § 2, 84 Stat. 725.)

JUDICIAL REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.)

Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-35

In the Supreme Court of the United States

OCTOBER TERM, 1989

THE SUAREZ CORPORATION, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly rejected petitioner's due process and free speech challenges to administrative proceedings before the United States Postal Service that resulted in the issuance of an order directing petitioner to cease and desist from making certain false representations in connection with a scheme to help persons locate "unclaimed funds."

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals' order affirming the judgment of the district court (Pet. App. 1a) is unreported. The opinions of the district court (Pet. App. 2a-3a, 4a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1989. The petition for a writ of certiorari was filed on May 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 1985, the United States Postal Service filed an administrative complaint against petitioner seeking to enjoin it from making certain false representations

in connection with a mass mailing campaign that it was conducting. The mailing, which had been sent to approximately 1.9 million persons, was sent by petitioner under pseudonyms such as "Department of Unclaimed Funds." The mailing suggested that if the recipient completed a form and returned it along with a $19 fee petitioner would advise him how to claim certain funds being held for him. Persons who sent in the $19 did not receive any money, but instead received a booklet listing the addresses of government agencies holding unclaimed funds and "discuss[ing] other possible sources of unclaimed money such as safe deposit boxes." Pet. App. 20a.

The Postal Service alleged, pursuant to 39 U.S.C. 3005, that the mailings contained false representations. After a five-day hearing, the administrative law judge (ALJ) agreed. In concluding that petitioner falsely implied that it was a government agency, the ALJ relied on evidence showing, for example, that the letters petitioner sent from the "Department of Unclaimed Funds" had a "picture of an eagle in the upper left-hand corner * * * clutching an American flag." Pet. App. 26a. The ALJ concluded that petitioner's mailings were misleading in other ways as well. For example, the evidence showed that many state agencies had been contacted by people who received petitioner's letters and "thought that research had been done establishing their eligibility to unclaimed funds." *Id.* at 41a. The ALJ noted petitioner's contention that its mailings were protected by the First Amendment, but rejected that argument on the ground that the First Amendment does not protect false advertisements. *Id.* at 54a. Accordingly, the ALJ issued an order requiring petitioner to cease and desist from making the false representations charged in the administrative complaint in connection with any promotion through the mails. *Id.* at 56a-57a. The ALJ also issued instructions to petitioner's local postmaster

directing him to refuse to deliver mail to petitioner related to the promotional enterprise charged in the complaint and forbidding the payment of any postal money order drawn to petitioner in connection with that scheme. *Id.* at 58a-63a.

Petitioner then filed a complaint in the United States District Court for the Northern District of Ohio alleging that (1) the ALJ's decision was not based upon substantial evidence, and was arbitrary and capricious and an abuse of discretion; (2) the administrative proceedings conducted by the Postal Service deprived petitioner of due process under the Fifth Amendment because ALJs conducting such proceedings are biased in favor of the Postal Service; and (3) the cease-and-desist order issued by the ALJ in this proceeding deprived petitioner of freedom of speech in violation of the First Amendment. The government moved to dismiss petitioner's First and Fifth Amendments claims. The district court granted the motion, stating that "the claims asserted in Counts II and III [the due process and free speech claims] are subsumed in the appeal set forth in Count I, which alleges that the challenged action is not based upon substantial evidence and is arbitrary, capricious and an abuse of discretion." Pet. App. 3a. The district court subsequently held that the ALJ's decision was supported by substantial evidence. *Id.* at 4a-15a. The court of appeals affirmed the judgment of the district court on the basis of the district court's opinion. *Id.* at 1a.

ARGUMENT

Petitioner does not renew its argument that the ALJ's order was not supported by substantial evidence, but contends that the courts below improperly rejected its constitutional arguments. Review is not warranted to consider those contentions.

Petitioner argues that because the respondents in administrative proceedings before the Postal Service are usually unsuccessful, the administrative officials responsible for making the decisions in those proceedings are "prejudiced and biased against all respondents brought before them." Pet. 7. Petitioner does not assert that Postal Service proceedings are procedurally defective, nor does petitioner make any specific allegations of personal bias with respect to the ALJ in this case. However, petitioner suggests that "judicial officers who share the same office premises in L'Enfant Plaza as those who prosecute cases before them" are bound to be prejudiced. *Ibid.*

However, this Court has rejected a due process challenge to administrative proceedings based on the combination of prosecutorial and adjudicative functions in a single agency. *Withrow* v. *Larkin*, 421 U.S. 35, 46-55 (1975). None of the three cases cited by petitoner (Pet. 9) suggests that any other result is appropriate here. In two of those cases, the Court rejected global challenges like petitioner's to an entire category of administrative proceedings. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980) (rejecting a due process challenge to Labor Department proceedings before ALJs in which the civil penalties assessed for child labor violations were returned to the office that investigated and prosecuted the case); *Withrow* v. *Larkin*, *supra* (rejecting a due process challenge to a state medical examining board which both investigated charges of medical misconduct and conducted administrative hearings on the same charges). In the third case, the Court held that a State law authorizing a judge to act as a "one-man grand jury" in secret proceedings and then to adjudicate contempt charges arising out of those proceedings, thus placing the judge in the incompatible roles of witness and decision-maker, violated due process. *In re Murchison*, 349 U.S. 133 (1955).

Those cases cast no shadow on the propriety of the administrative proceedings conducted by the Postal Service under 39 U.S.C. 3005. In those proceedings, ALJs act, in public, as adjudicators, not as witnesses. See 39 C.F.R. 952.17. The record demonstrates that the administrative proceeding in this case afforded petitioner a full opportunity to respond to the allegations in the Postal Service's complaint, and the "very thorough opinion" of the ALJ (Pet. App. 9a) shows that he conducted a careful and balanced review of the evidence. In stating that petitioner's due process claim was "subsumed" in his challenge to the merits of the ALJ's decision (*id.* at 3a), the district court recognized that petitioner's due process claim was indistinguishable as a practical matter from its factual argument that the case against him had not been proved by the Postal Service. The court correctly concluded that the ALJ's findings were supported by substantial evidence, a conclusion petitioner does not challenge, so petitioner was not deprived of due process.

Petitioner's contention that it was deprived of review of its First Amendment claim is also without merit. As the ALJ recognized (Pet. App. 54a), the First Amendment does not protect false advertising. *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948). Thus, whether petitioner's free speech rights were violated depends entirely on whether its advertising was deceptive, which it was.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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SEPTEMBER 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241-699/00410